TAN YOK FONG (F), THE ADMINISTRATRIX OF THE ESTATE OF HWANG CHUAN SANG, DECEASED

v.

KHOO BAN KOK & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUIT NO. 25-412 OF 1988]
28 JULY 1994

PRACTICE & PROCEDURE: Appeal against Plaintiff's amendment of writ and statement of claim - Amendment relating to capacity of plaintiff to sue - Plaintiff originally making dependancy claim as administratrix - Plaintiff seeking to amend writ to claim in personal capacity as dependant - Whether misdescription to title rendered writ a nullity - Power of Court to alter the capacity in which a party sues - Order 20 r. 5 of the Rules of the High Court 1980.

This was an appeal against the decision of the learned Senior Assistant Registrar (SAR) allowing the plaintiff's application to amend the writ and statement of claim dated 17 December 1988.

The amendment related to the plaintiff's capacity to sue. In the original title the plaintiff was described as the administratrix of the deceased's estate but according to the plaintiff, as her claim was purely a dependancy claim under s. 7 of the Civil Law Act 1956, the description of herself as administratrix was without basis especially so as the Grant of Letters of Administration to the said estate was only extracted on 19 December 1988.

The issue was whether at the time of filing of the writ and statement of claim the plaintiff was suing in a representative capacity or by way of a dependancy claim. Defendant's Counsel contended that the plaintiff sued the defendants as administratrix but did not have the capacity as the Letters of Administration was only extracted 2 days after the issue of the writ. Thus the entire action was a nullity.

Plaintiff's Counsel contended that nowhere in the statement of claim was there an assertion that the plaintiff was suing as administratrix for the benefit of the estate. Counsel argued that in fact the statement of claim revealed the plaintiff was claiming in her personal capacity as a dependant, therefore it was at most a misdescription which did not make the writ a nullity.

Held:

[1] An examination of the writ and statement of claim is relevant for the purpose of ascertaining whether the words "Administratrix of the estate of Hwang Chuan Sang, deceased" was a misdescription. It clearly shows the plaintiff filed the writ for the benefit of herself as a dependant under the provisions of s.7 of the Civil Law Act 1956 (CLA). If it was intended to be for the benefit of the estate of the deceased, it would have been brought under s.8 of the CLA.

[2] The authorities relied on by Counsel for the defendant were not relevant for the purpose of considering the issue of misdescription in the title. In fact the argument of Counsel could properly be described as a technicality with a vengeance. On this ground alone the plaintiff should succeed.

[3] Even assuming that the words "the Administratrix of the estate of Hwang Chuan Sang, deceased" must be construed to mean that the plaintiff was suing in the capacity of administratrix, in view of O. 20 r. 5(4) of the Rules of the High Court 1980 (RHC) the Court had the power to alter the capacity in which a party sues as the administrator of the deceased, even if he acquired the capacity after the commencement of the action, and further, even if the relevant period of limitation had expired. Furthermore, the plaintiff could as a widow make a dependancy claim from the beginning of the proceedings as the relief claimed was not different from the one already claimed and the facts were the same or substantially the same so that the proper issues were before the Court for determination.

[Appeal dismissed. Order of the learned SAR affirmed except as to costs. Costs to be borne by plaintiff both here and before the learned SAR].

Cases referred to:
Comptroller of Income Tax v. Yan Tai Min [1965] 31 MLJ 255 ***(cit)***
Ang Hoi Yin v. Sim Sie Hau [1969] 2 MLJ 3 ***(cit)***
P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors. [1961] 27 MLJ 89 ***(cit)***
Bowler v. John Mowlem & Co. Ltd. [1954] 3 All ER 556 ***(foll)***
Stebbings v. Holst & Co. Ltd. [1953] 1 All ER 925 ***(refd)***
Ruhani bt Mohiat & Anor. v. Abdul Karim bin Mat Ali & Anor. [1993] 2 AMR 31 : 1339/[1993] 3 CLJ 524 ***(foll)***
Hock Hua Bank Ltd. v. Leong Yew Chin [1987] 1 MLJ 232, [1987] CLJ 128 ***(foll)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Probate and Administration Act 1959
Rules of the High Court 1980, O. 20 r. 5(1), (4)
Rules of the Supreme Court 1957

Other sources referred to:
Bullen, Leake & Jacobs on Precedents of Pleadings, 13th Edn., p. 373

For the plaintiff - Ho Thian Cheh; T/n. Ho Thian Cheh & Co.
For the defendant - Rajendran; T/n. R.K. Nathan & Co.

JUDGMENT

Haidar bin Mohd Noor J:
This is an appeal by the defendants against the decision of the learned Senior Assistant Registrar given on 11 September 1991 (encl. 45) whereby the application of the plaintiff for amendment of the writ of summons and the statement of claim dated 17 December 1988 (encl. 41), was allowed with costs in the cause.

Basically, the amendment relates to the status or capacity of the plaintiff to sue. The original description of the plaintiff in the writ reads:

> Tan Yok Fong (f), The Administratrix of the Estate of Hwang Chuan Sang, Deceased, Suing For and On Behalf of the Dependants of the Deceased, Namely (1) Tan Yok Fong (f), (2) Hwang Kai Sen @ An Choi Seng and (3) Lee Hoi Chen (f).

Paragraph 1 of the statement of claim sets out the details of the dependants.

In the application, the proposed amendment of her status reads:

> Tan Yong Fong as a dependant of Hwang Chuan Sang, deceased.

Paragraph (1) of the statement of claim, was proposed to be amended accordingly. Other amendments are formal and consequential.

In her affidavit in support of her application for amendment (encl. 40) she sets out two grounds, namely:

(7) As my claim is purely a dependancy claim within the ambit of s. 7 of the Civil Law Act 1956 at the time of filing the writ of summons, the said description of me as the Administratrix of the estate of Hwang Chuan Sang was wholly without basis and in any event unnecessary having regard to the fact that the Grant of Letters of Administration to the said estate was only extracted on 19 December 1988.

(8) The parents of the deceased, Hwang Kai Sen @ An Choi Seng and Lee Hoi Chen (f) passed away on 22 April 1989 and 10 September 1990 respectively.

She further added that the amendment will not cause any prejudice to the defendants and the amendments will ensure that the proper/real issues are before the Court for determination.

The issue is whether at the time of the filing of the writ and the statement of claim the plaintiff was suing in a representative capacity or by way of a dependancy claim. It was the contention of the Counsel for the defendants that the plaintiff sued the defendants in the capacity of an administratrix and therefore did not have the capacity as the Letters of Administration was extracted only on 19 December 1988 - 2 days after the issue of the writ and hence the entire action was a nullity. He cited the cases of *Comptroller of Income Tax v. Yan Tai Min* [1965] 31 MLJ 255; *Ang Hoi Yin v. Sim Sie Hau* [1969] 2 MLJ 3; *P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors.* [1961] 27 MLJ 89 in support thereof. It is not disputed that although the petition for grant of Letters of Administration was granted on 6 July 1988, the relevant grant of Letters of Administration was only extracted on 19 December 1988.

According to the Counsel for the plaintiff, a careful scrutiny of the writ and the statement of claim would show that the plaintiff was not suing in her capacity as the administratrix of the estate of Hwang Chuan Sang, deceased. It was contended that nowhere in the statement of claim is there any assertion that the plaintiff was suing as the administratrix of the estate of Hwang Chuan Sang, deceased for the benefit of the said estate. A perusal of the statement of claim (paragraphs 1, 5, 6 and 7) would seem to reveal that the plaintiff was claiming in her personal capacity as a dependant for damages and pecuniary loss in accordance with s. 7 of the Civil Law Act 1956 dealing with dependancy claims. The plaintiff therefore contended that at most, the description of the plaintiff in this action as the administratrix is a misdescription and therefore does not make the writ a nullity and cited the case of *Bowler v. John Mowlem & Co. Ltd.* [1954] 3 All ER 556 in support thereof.

An examination of the writ and the statement of claim in this action, in my view, clearly shows the plaintiff filed the writ for the benefit of herself as a dependant under the provisions of s. 7 of the Civil Law Act 1956. If it is intended to be for the benefit of the estate of the deceased, Hwang Chuan Sang, it would have been brought under s. 8 of the Civil Law Act 1956. As Lord Denning, LJ said in *Bowler v. John Mowlem & Co. Ltd., supra,* at page 558:

> It is true that the plaintiff described herself as administratrix in the title of the action and in the statement of claim, but a misdescription in the title is not fatal; it does not make a writ a nullity any more than does a misdescription of a woman as a spinster when she

> is in fact a married woman. A misdescription in the title is never fatal; it can always be cured by amendment in the same way as a misnomer. The thing which cannot be cured is the bringing of an action in a representative capacity when that capacity does not exist.

What prompted the plaintiff to file the amendments was because of the notice given by the Counsel for the defendants to question the capacity or status of the plaintiff to sue. Hence the application of the plaintiff to make it clear in regard to her capacity or status to file the writ.

The authorities relied on by the Counsel for the defendants are not relevant for the purpose of considering the issue of misdescription in the title. In fact the argument of the counsel for the defendants could properly be described as a technicality with a vengeance (see *Stebbings v. Holst & Co. Ltd*. [1953] 1 All ER 925 @ p. 926). On this ground alone the plaintiff should succeed and the order made by the learned Senior Assistant Registrar was a correct one except for costs which I shall deal later in my judgment.

I do not, with respect, agree with the contention of the Counsel for the defendants that the statement of claim here should be disregarded and it would make no difference so long as the title to the writ indicated that the plaintiff was suing in a representative capacity. In my view an examination of the statement of claim is relevant for the purpose of ascertaining whether the claim of the plaintiff that the words "administratrix of the estate of Hwang Chuan Sang, deceased" were a misdescription. The statement of claim seems to support her claim that she was not suing in a representative capacity under the provisions of s. 8 of the Civil Law Act 1956.

Even assuming that the words "the Administratrix of the estate of Hwang Chuan Sang, deceased" must be construed to mean that the plaintiff was suing in the capacity of the administratrix of the estate of Hwang Chuan Sang, deceased, this called for a consideration of the case of *Ruhani bt Mohiat & Anor v. Abdul Karim bin Mat Ali & Anor*. [1993] 2 AMR 31 at p. 1339 relied on by the Counsel for the plaintiff. I was advised by the Counsel for the defendants that this case is pending appeal in the Supreme Court. Having read this case, I am inclined to agree with it as the learned Judge had adequately considered the relevant sections of the Probate and Administration Act 1959 (Act 97) and the authorities relied on by the Counsel for the defendants in this action when he held that it was sufficient for the party to be clothed with the capacity or status to file a writ once the Letters of Administration is granted. It was unfortunate perhaps that the learned Judge did not consider the effect of O. 20 r. 5(4) of the Rules of the High Court, 1980 ('RHC'). It should be borne in mind that the authorities relied on by the Counsel for the defendants were decided under the old Rules of the Supreme Court 1957 in which there is no similar provision as O. 20 r. 5(4) of RHC.

Be that as it may, in view of O. 20 r. 5(4) of RHC the Court has the power to alter the capacity in which a party sues as the administrator of the deceased, even if he has acquired that capacity after the commencement of the action, and further, even if the relevant period of limitation has expired. According to **Bullen, Leake & Jacobs on Precedents of Pleadings** (13th Edition) at page 373 the learned author said:

> The effect of this rule is that cases such as *Ingall v. Moran* [1944] KB 160, which provided that an administrator could not commence an ordinary action for debt or damages until the letters of administration were issued, are now negatived. Thus it is only actions begun in the name of the deceased as plaintiff which are nullities, incapable of being cured by any of the Court's present powers.

In considering O. 20 r. 5 of RHC (which has no similar provision in the previous Rules of the Supreme Court 1957 which has been repealed and replaced by RHC) the Supreme Court in *Hock Hua Bank Ltd. v. Leong Yew Chin* [1987] 1 MLJ at page 232, Abdul Hamid, Ag. LP (as he then was) after citing the passages in a number of English authorities stated:

> From the passages cited above it is overwhelmingly clear that the underlying reasons governing the power under r. 5 seems to be that if the proceedings had from the beginning been properly formulated and constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant, and accordingly the Court, if in its discretion thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in the paras, so that such defects in the proceedings are treated as having been cured *ab initio*...

Earlier on at page 230, Abdul Hamid, Ag. LP (as he then was) said:

> The Court has the power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, subject to the very important condition, namely that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

In this action the plaintiff could as a widow sue for dependancy claim from the beginning of the proceedings as the relief claimed is not different from the one already claimed except less the costs of grant of letters of administration and the facts are the same or substantially the same so that the proper/real issues are before the Court for determination.

Clearly, therefore the Court in this case should see to the justice of the case and exercise its discretion by allowing the amendment but in doing so, it is trite law that it is only just that the defendants should be compensated in costs in any event by the prejudice thereby caused (see O. 20 r. 5(1) of RHC). The defendants are given two weeks from the date of this order to file amended defence as may be necessary.

In the circumstances I dismiss the appeal and affirm the order of the learned Senior Assistant Registrar except as to costs which shall be borne by the plaintiff, both here and before the learned Senior Assistant Registrar.